

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOHN and MARILYN LEWIS,  
individually and as the representatives of  
all persons similarly situated

Plaintiffs,

v.

HARTFORD CASUALTY INSURANCE  
COMPANY et al.,

Defendants.

CASE NO. C15-5275 RBL

ORDER GRANTING MOTION TO  
DISMISS CLAIMS AND TO STRIKE  
TREBLE DAMAGES

DKT. #43

THIS MATTER is before the Court on Defendants' Motion to Dismiss Plaintiff Lewis's claims and to strike his claim for treble damages. [Dkt. #43]. Property and Casualty Insurance Company of Hartford insured Lewis's vehicle, which was hit while he was on vacation. He alleges that Property and Casualty breached their contractual agreement and violated the CPA by failing to adequately compensate him for his diminution in value damages. He sued Property and Casualty, as well as seven other insurance companies, claiming to represent a class of similarly situated insureds.

1 The seven Defendants that did not insure Lewis's vehicle<sup>1</sup> seek dismissal of his claims  
2 for lack of standing. They argue he has not alleged that he suffered an injury fairly traceable to  
3 them. All Defendants (including Property and Casualty) seek dismissal of his treble damages  
4 claim. They argue he is judicially estopped from asserting it, because he disclaimed treble  
5 damages when he unsuccessfully sought remand by arguing that his claims did not reach  
6 CAFA's jurisdictional limit.

7 Lewis argues that he has standing to sue all eight Defendants, because he pled that they  
8 share a single claims staff and operate under a single set of policies and procedures in  
9 Washington, making these entities either agents for and alter egos of one another and/or  
10 juridically linked. He also argues that judicial estoppel does not bar his treble damages claim,  
11 because the Court neither relied upon, nor accepted, his disclaimer.

## 12 DISCUSSION

### 13 I. Standing

14 The non-insuring Defendants seek dismissal of Lewis's claims for lack of standing under  
15 Rule 12(b)(1). They argue that he does not have standing to sue them because only Property and  
16 Casualty had a contractual relationship with him, so only Property and Casualty could have  
17 injured him. Without standing, the Court does not have jurisdiction over his claims against them.  
18 Lewis argues that because the National Association of Insurance Commissioners treats all eight  
19 defendants as one company, all conduct business in Washington, and all share policies and staff,  
20 "the normal standing rules do not apply." [Dkt. 47, Response, pg. 7–8].

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23 <sup>1</sup> The non-insuring Defendants include Hartford Casualty Insurance Company, Hartford  
24 Underwriters Insurance Company, Trumbull Insurance Company, Twin City Fire Insurance  
Company, Hartford Insurance Company of the Midwest, Hartford Accident and Indemnity  
Company, and Sentinel Insurance Company, Limited.

1        Lewis bears the burden of proving subject matter jurisdiction. *See Stock West, Inc. v.*  
2 *Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989); *see also Thornhill Publishing Co.,*  
3 *Inc. v. Gen'l Tel & Elect. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). To establish Article III  
4 standing, he must show that he (1) suffered an injury in fact that is (2) fairly traceable to the  
5 alleged conduct of the defendants, and that is (3) likely to be redressed by a favorable decision.  
6 *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). As this Court explained in *Shin*  
7 *v. Esurance Ins. Co.*, allegations of common claims handling practices and pooled labor  
8 resources are insufficient to establish standing where the plaintiff has not alleged a relationship  
9 or contact with the defendant. 2009 WL 688586, at \*5 (W.D. Wash. Mar. 13, 2009). A plaintiff  
10 cannot make allegations based solely on unidentified class members who a related entity might  
11 have injured. *See, e.g., Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 1001 n.7 (9th Cir. 2006);  
12 *see also Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (Even in a class  
13 action, “constitutional standing requirements [must be] satisfied before proceeding to the  
14 merits.”).

15        Lewis has not satisfied his burden of establishing that his alleged injury—a failure by the  
16 Defendants to disclose diminished value loss and to adjust for this loss—is fairly traceable to the  
17 seven non-insuring Defendants, with whom he does not share privity of contract. Therefore, the  
18 claims against the non-insuring Defendants are DISMISSED without prejudice. Because the  
19 potentiality exists that he could plead sufficient allegations “to raise the issue of business  
20 relationships above the speculative level,” however, the court GRANTS Lewis leave to amend  
21 his complaint. *See Martin v. Twin City Fire Ins. Co.*, 2009 WL 902072, at \*2 (W.D. Wash. Mar.  
22 31, 2009).

## II. Treble Damages

Defendants seek dismissal of Lewis's treble damages claim, arguing that he waived it and should be judicially stopped from asserting it. They also seek to strike this claim under Rule 12(f). Lewis argues that judicial estoppel does not bar his claim, because this Court did not accept his disclaimer when it denied remand.

Judicial estoppel is an equitable doctrine invoked to prevent a party from gaining an advantage by taking inconsistent positions and to preserve the orderly administration of justice and regard for the dignity of judicial proceedings by protecting against a litigant playing fast and loose with the courts. *See Milton H. Greene Archives v. Marilyn Monroe LLC*, 692 F.3d 983, 993 (9th Cir. 2012) (citing *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001)). It "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument in another phase." *See New Hampshire v. Maine*, 532 U.S. 742, 748 (2001) (citing *Pegram v. Herdrich*, 530 U.S. 211, 227, n.8 (2000)). By prohibiting parties from deliberating changing positions according to the exigencies of the moment, it protects the judicial process's integrity. *See id.*

The circumstances under which judicial estoppel may be invoked are not reducible to a general formulation. *See id.* at 752. Nevertheless, the Supreme Court has identified three factors that help inform a Court's decision: (1) whether a party's later position is clearly inconsistent with its earlier position, (2) whether the party has succeeded in persuading a court to accept its earlier position, and (3) whether the party seeking to assert the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *See id.*

Here, all three factors are met. First, in his original complaint filed in state court, Lewis disclaimed treble damages for himself and his putative class members. [Dkt. #1, Notice of

1 Removal, Ex. 3, Compl. ¶ 6.10]. After Defendants removed the case to this Court, he repeated  
2 this disclaimer in an effort to seek remand, arguing that because he had not pled treble damages,  
3 the amount-in-controversy could not meet CAFA's \$5 million jurisdictional threshold. [Dkt. #21,  
4 Motion for Remand, pg. 3]. The Court denied remand, reasoning that because his CPA claim put  
5 treble damages at issue, CAFA's threshold had indeed been met. [Dkt. # 26]. Lewis then filed a  
6 request for permission to appeal to the Ninth Circuit. [Dkt. #30]. After it was denied, he filed his  
7 amended complaint, in which he claims treble damages. [Dkt. #31, AC ¶¶ 7.1]. By expressly  
8 disclaiming and then claiming treble damages for himself, Lewis has taken inconsistent  
9 positions.

10 Second, the Court relied upon his disclaimer when it expounded its resources to consider  
11 his motion for remand. It accepted his personal disclaimer in doing so—relying on its veracity—  
12 but could not sanction his disclaimer of his putative class members' potential award. *See*  
13 *Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345, 1349 (2013) (lead plaintiff's precertification  
14 disavowal of damages binds only himself). That the Court nevertheless determined CAFA's  
15 jurisdictional threshold had been met, and denied the remand, does not resurrect Lewis's treble  
16 damages claim.

17 Third, Lewis's change in position would impose an unfair detriment on the Defendants,  
18 which had to request removal and defend against a motion for remand. Therefore, to prevent an  
19 improper use of judicial machinery, the Defendants' motion [Dkt. #43] is GRANTED; Lewis's  
20 personal request for treble damages is STRICKEN from his amended complaint [Dkt. #31].  
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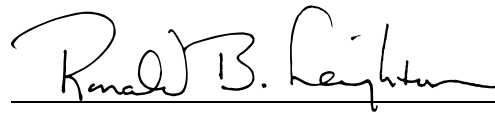
**CONCLUSION**

Accordingly, the Court GRANTS Defendants' Motion [Dkt. #43]: Lewis's claims against the non-insuring Defendants are DISMISSED without prejudice, and his personal claim for treble damages is STRICKEN.

The Court defers judgment on whether Lewis may serve as class representative.

IT IS SO ORDERED.

Dated this 22<sup>nd</sup> day of January, 2016.

A handwritten signature in black ink, reading "Ronald B. Leighton". The signature is written in a cursive style with a horizontal line underneath.

Ronald B. Leighton  
United States District Judge